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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. — 75-409

FREDERICK FINKBEINER,

Petitioner,

vs.

RICHARD MATTOX,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS

This petition requests this Court to review the judgment of the Seventh Circuit Court of Appeals in its unreported Order of June 16, 1975, (No. 75-1330) attached to this petition as Appendix A. The earlier opinion of the Seventh Circuit Court of Appeals remanding this case to the District Court for the Northern District of Illinois for an evidentiary hearing is reported at 507 F. 2d 919 (7th Cir. 1974) and is attached to this petition as Appendix B. The opinion of the District Court on remand is reported at 389 F. Supp. 1045 (N. D. Ill. 1975). A procedural history of the case is given below in the statement of the case along with citations to the other opinions of the District Court in this case.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued their Order reversing the judgment of the District Court on June 16, 1975. No petition for rehearing has been filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Seventh Circuit Court of Appeals repudiate this Court's mandate to restrict the holding of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) to its facts?

2. Was Richard Mattox' statement of October 2, 1963 made voluntarily?

STATEMENT OF THE CASE

This case revolves around a statement given by Respondent Richard Mattox to police in the early morning hours of October 2, 1963, and later admitted into evidence as Exhibit 24 at his trial for murder. Respondent alleges that the statement was taken in violation of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and was therefore inadmissible at his trial. Respondent also contends that it was involuntary and inadmissible for that reason.

Respondent Mattox was convicted of murder at a bench trial in the Circuit Court of Cook County, Illinois, in August, 1965. After affirmance of his conviction upon direct appeal in state court, respondent filed a petition for federal habeas corpus relief on grounds unrelated to his present claims. This petition was dismissed by the District Court for the Northern District of Illinois (No. 69-C-2059, December 12, 1969), as was a subsequent, amended petition in the same proceeding. Mattox then unsuccessfully petitioned the state court under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., ch. 38, § 122 et seq., in 1970.

Respondent filed the present petition for a writ of habeas corpus in the Northern District of Illinois in May, 1973, *United States ex rel. Mattox* v. *Scott*, No. 73-C-1396 (later amended to *United States ex rel. Mattox* v. *Finkbeiner*). The District Court, the Honorable Richard B. Austin presiding, granted in part the State's Motion to Dismiss or for Summary Judgment in November, 1973, *United States ex rel. Mattox* v. *Scott*, 366 F. Supp. 1294 (N. D. Ill. 1973). And on March 11, 1974, the Court of its own initiative granted the same Motion for Summary Judgment with respect to the remaining issues, 372 F. Supp. 304 (N. D. Ill. 1974). On appeal the Seventh Circuit affirmed the District

Court's decision of November, 1973, but reversed the decision of March, 1974, and remanded the case with instructions to hold an evidentiary hearing to determine whether Mattox' rights under the Sixth and Fourteenth Amendments as set forth in Escobedo had been violated. 507 F. 2d 919 (7th Cir. 1974). Among the findings to be made at the hearing was whether Mattox had been warned of his right to remain silent during his interrogation on October 1 and 2, 1963.

In accordance with the Seventh Circuit's ruling, the District Court scheduled an evidentiary hearing for February 7, 1975. Before that date, however, the parties entered into a stipulation of facts which describes respondent's arrest and interrogation as related below.

Richard Mattox was arrested on October 1, 1963, between six and eight o'clock in the morning and was then taken by police car to the Bedford Park Sheriff's station in suburban Cook County. Later that afternoon or early that evening, Mattox was transferred by car to Chicago Police Headquarters on State Street. He remained there until approximately 2:00 A.M., by which time he had made the statement in question. (Stipulation, ¶¶ 2, 3, 4, 11.)

Shortly after his arrival at the Bedford Park station, Mattox requested and was allowed to phone his attorney at least two or three times. The attorney could not be reached. Mattox made other unsuccessful attempts later in the morning and afternoon at Bedford Park and then that evening at the State Street police headquarters. (Stipulation, ¶¶ 8, 10.)

Commander Flanagan and Lieutenant Cartan of the Chicago police force began to interrogate respondent early in the afternoon at Bedford Park and continued after respondent's transfer to police headquarters, Commander

Flanagan interrogated Mattox for not more than two hours, and Lieutenant Cartan interrogated for a total of two or three hours. This questioning was not conducted continuously by these officers working in shifts, but rather sporadically at Bedford Park and the State Street headquarters. In addition, these interrogation periods at times overlapped, with Commander Flanagan and Lieutenant Cartan both present at once. (Stipulation, ¶ 6.)

From the time of his arrest early in the morning of October 1, 1963, through the time that his statement was taken, respondent was never advised, either before or after he attempted to contact his attorney, that he had a right to remain silent. No such warning was given because this interrogation took place prior to the *Escobedo* and *Miranda* cases and it would not have been police procedure at that time to advise an arrested suspect of his right to remain silent. (Stipulation, ¶ 12.)

With respect to other aspects of respondent's treatment during the interrogation period, it should be noted that at Chicago Police Headquarters respondent was kept in a large conference room where other officers involved in the investigation of the murder came and went. These areas were accessible to the public for most of the time that respondent was there. (¶ 23.) Respondent was not handcuffed virtually the entire time that he was interrogated at the State Street station. (¶ 24.) No promises or physical threats of any kind were made to Mattox by the police at any time during the periods in question in order to induce him to make a statement (¶ 17.) nor did the police misrepresent any facts in order to elicit a statement (¶ 18.). No statement was made to Mattox by any police officer that he should refuse to sign anything until he saw a lawyer or that his rights would be protected if he didn't sign anything until he saw a lawyer. (¶ 21.)

Respondent was permitted to use the telephone upon request and attempted to contact his mother and brother (¶ 32.) Respondent ate when the police ate and ate the same food that the police did. (¶ 19.) He was allowed to use the men's room when he wanted. (¶ 20.)

Concerning respondent's statement itself, later admitted as Exhibit 24 at his trial, it was stipulated that it was taken by Assistant State's Attorney Joseph McDermott at approximately 2:00 AM on October 2, 1963, at Chicago Police Headquarters. Although the subject matter of the statement was discussed with respondent during the court of his interrogation, the questions were not "rehearsed" and he was not given a "dry run" through the questions directly before that statement was actually taken. (¶ 29.) Mr. Mattox did not object to the presence of a stenographer at the taking of the statement (¶ 30.) but he did refuse to sign it (¶ 36.). Finally, although the fact is not included within the stipulation, Exhibit 24 itself shows that during the taking of his statement respondent three times interrupted the taking of the statement and asked that what he was about to say not be recorded by the stenographer. (Transcript (Tr.) at 290, 291, 293.) Each time respondent was allowed to speak off the record with the assistant state's attorney and then resume the making of his statement.

On February 6, 1975, the Stipulation of Facts was filed in lieu of an evidentiary hearing and Respondent Mattox, as petitioner for habeas corpus relief, filed a Motion for Discharge. The matter was briefed and in a Memorandum and Judgment Order dated March 12, 1975, the District Court denied Mattox' Motion for Discharge and dismissed his petition for a writ of habeas corpus on the gronuds that *Escobedo* did not apply to the facts of the case, and that Mattox' "confession was freely and knowingly made" (p. 2).

Respondent filed a notice of appeal on March 25, 1975. The Court of Appeals granted a Certificate of Probable Cause in April and the case was argued in May. On June 16, 1975, the Court issued its Judgment and Order (No. 75-1330) reversing the decision of the District Court and remanding the case with instruction that Mattox be brought to trial or released from custody within 120 days. On August 7, 1975) the Court ordered a stay of this mandate to and including August 25, 1975.

The Court of Appeals stated in its decision (p. 3) that "the principles in *Escobedo* were indeed apposite to this case and in addition that petitioner has a right under *Escobedo* to be warned of his right to remain silent before interrogation was contineud in the face of a request to consult with counsel." The Court did not mention the issue of voluntariness, but it did say (p. 3) that "the single issue on remand was the adequacy of the warning" to remain silent given to Mattox.

Present Petitioner Warden Frederic Finkbeiner (Respondent-Appellee below) presents this petition for certiorari on the ground that the Court of Appeals erroneously applied *Escobedo* to the facts of the present case and that in doing so expanded *Escobedo* beyond the restricted scope delineated by this Court in *Escobedo* itself and in later opinions discussing *Escobedo*.

REASONS FOR GRANTING THE WRIT

A.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS REPUDIATED THIS COURT'S REPEATED MANDATE TO RESTRICT ESCOBEDO TO ITS FACTS.

1.

The Seventh Circuit Court of Appeals Ignored This Court's Holding That A Suspect's Statement Is Inadmissible Only If He Has Been Denied Access To Counsel.

Each time that this Court has had occasion to comment at some length on the scope of its decision in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), it has firmly instructed that the *Escobedo* ruling be restricted to the facts of that case. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Frazier* v. *Cupp*, 394 U.S. 731; *Kirby* v. *Illinois*, 406 U.S. 682 (1972); *Michigan* v. *Tucker*, ——U.S.——, 94 S. Ct. 2357 (1974). The Seventh Circuit has, on the contrary, interpreted *Escobedo* expansively, applying its holding to a factual situation far different and far less aggravated than that of *Escobedo*. The Seventh Circuit has held, in effect, that in *Escobedo* this Court intended to announce an absolute per se rule, insensitive to possible differences in the factual situation of a particular case and capable of mechanical application.

The Seventh Circuit's misinterpretation of the holding in *Escobedo* centers around the phrase "denied an opportunity to consult with his lawyer," 378 U.S. at 491. This Court clearly held that the denial of an opportunity to consult with counsel must be present, along with four other enumerated factors to cause a statement to be inadmissible

under the *Escobedo* rule, 378 U.S. 490-491. The Seventh Circuit ignored this ruling and despite facts which under no circumstances could amount to a "denial" of the opportunity to consult with counsel, held that Mattox' statement was inadmissible because he had not been warned by police that he had a right to remain silent.

This is an interpretation of *Escobedo* retroactively infused with the spirit of *Miranda* v. *Arizona*, 384 U.S. 436 (1965), a decision in which this Court did more nearly approach a per se rule by requiring the procedural safeguard of specific warnings. (Even there, however, the Court was careful to point out that the warnings are mere safeguards to protect underlying constitutional rights and could conceivably be replaced with other forms of protective devices. *Miranda* v. *Arizona*, 384 U.S. at 467. See also *Michigan* v. *Tucker*, 94 S. Ct. at 2364. The Court of Appeals' decision in the present case has transformed the fact-sensitive ruling of *Escobedo* into a Miranda-esque dictum.

2.

What This Court Meant By The Phrase Denial Of The Opportunity To Consult With Counsel.

The Court of Appeals in its Order of June 16, 1975, (p. 2) and Mattox in his briefs and memoranda below focused on one summary sentence from the Supreme Court's Decision in *Escobedo:*

> Where, as here, (1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect has been taken into police custody, (3) the police carry out a process of interrogations that lends itself to eliciting incriminating statements, (4) the suspect has requested and been denied an opportunity to consult with

> his lawyer, and (5) the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment . . .
>
> 378 U.S. at 490, 491.

What neither the Court of Appeals nor Mattox would accept is that behind the phrase "denial" of assistance of counsel was the rather extreme factual situation in *Escobedo* which led this Court to make its ruling in that case. that case.

Danny Escobedo was arrested for the murder of his brother-in-law. He had a retained attorney who upon hearing of his arrest came to the police station and asked to see his client. The police refused. The lawyer spent from approximately 9:00 o'clock at night to 2:00 o'clock in the morning at the police station trying to see his client. The police repeatedly refused his requests. In addition the police lied to Escobedo by telling him that his lawyer did not want to see him. The lawyer caught one glimpse of his client through a door which was quickly shut by the police. Moreover, the questioning of Escobedo was prolonged and hostile. He was handcuffed in a standing position and encircled by police.

As Mr. Justice Goldberg said at the beginning of the Court's opinion in *Escobedo*, "The critical question in this case is whether, *under the circumstances*, the *refusal* by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a *denial* of 'the Assistance of Counsel,' " 378 U.S. at 479. (Emphasis added.) The Court did not say that Danny Escobedo's right to counsel was violated because he had

requested counsel and "had not consulted counsel." Rather, the Court said that the facts of the case demonstrated an affirmative denial by the police of Escobedo's right to counsel, an active interference by the police in Escobedo's attempt to procure assistance.

Significantly, the one decision to which this Court turned in *Escobedo* as closest to its holding was *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963), in which the police had also *actively prevented* a lawyer at the police station from seeing his arrested client, 378 U.S. at 486-487. What was at issue in both *Donovan* and *Escobedo* was the deliberate intent of the police to prevent a defendant from seeing an attorney before they extracted a confession. This was not what happened in the present case. The police did not in any way prevent Mattox from consulting his lawyer. During the entire period of his interrogation, he was allowed to telephone his lawyer or anyone else he wanted and he did.

Ten years after *Escobedo* this Court in *Michigan* v. *Tucker*, 94 S. Ct. 2357 (1974) admonished that "*Escobedo* is not to be broadly extended beyond the facts of that particular case," 94 S. Ct. at 2361. And again the Court put the same fact-sensitive interpretation upon "denial" of counsel:

> As previously noted, the defendant in *Escobedo* had repeatedly asked to see his lawyer who was available at the police station. Those requests were denied, and the defendant ultimately confessed. Thus, in direct contrast to the situation here, the defendant in Escobedo was told that he did *not* have a right to see his lawyer, although he had expressly stated his desire to do so.
>
> 94 S. Ct. at 2365, n. 22.

3.

This Court Has Held That Escobedo Must Be Interpreted Narrowly.

Between *Escobedo* and *Michigan* v. *Tucker* this Court in three other decisions cautioned that the holding in *Escobedo* must be limited to the facts of the case. *Johnson* v. *New Jersey*, 384 U.S. 719, at 733-34 (1966); *Frazier* v. *Cupp*, 394 U.S. 731, at 737-39 (1969); *Kirby* v. *Illinois*, 406 U.S. 682, at 689 (1972). Closest to the present case in its factual situation was *Frazier*. There the arrested suspect had not been warned of his right to remain silent but had been told that he could get an attorney if he wanted one. Sometime after interrogation by the police had begun, Frazier showed signs of reluctance to speak further and said, "I think I had better get a lawyer before I talk any more." 394 U.S. at 738. The police continued their interrogation and Frazier continued to answer their questions. This Court judged Frazier's statement admissible with the following explanation:

> Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in Escobedo were unmistakably informed of their suspect's wishes; in fact Escobedo's attorney was present and repeatedly requested permission to see his client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found in *Escobedo* . . .
>
> 394 U.S. at 739.

In Frazier this Court looked to the conduct of the police in interrogating the arrested suspect and the role which

the police played — or did not play — in the suspect's not consulting counsel. The Court also looked to the intensity with which Frazier wanted counsel and when he wanted it, as well as his willingness to continue to answer questions without coercion after making his request for counsel. Assistance of counsel was not "denied" because the police evidenced no intent to affirmatively interfere with their suspect's wish to consult an attorney, and because the intensity of the suspect's desire for counsel was shown to be limited by his willingness to continue to respond to interrogation without an attorney in a non-coercive atmosphere. The Court looked to the facts and found no "denial."

4.

The Facts Of The Present Case Are Clearly Distinguishable From Escobedo.

In contrast to that application of *Escobedo* by this Court, the Seventh Circuit in the present case re-interpreted "denial" into a gimpy syllogism: Suspect has requested counsel; suspect has not consulted counsel; therefore suspect has been denied counsel. It is an interpretation superficially appealing in its abstract simplicity, but because of that very simplicity it is also an erroneous departure from the constitutional principles announced in *Escobedo*. The Seventh Circuit did not examine the facts of the case to determine whether *under the circumstances* the police acted affirmatively to "deny" Mattox his right to counsel as understood in *Escobedo*. If the Court had attempted to do so, it would have found that the facts in the present case are markedly different from those in *Escobedo* and that this difference makes *Escobedo* inapplicable.

Richard Mattox was detained and interrogated in a relaxed and not hostile atmosphere. There was no continu-

ous, prolonged questioning or attempts by police to overbear his will. He was not held incommunicado. Unlike Escobedo, Mattox was detained comfortably in a large room accessible to the public for most of time and was allowed to make any phone calls he wanted, including several to his lawyer. The police used neither physical threats, promises, lies nor trickery to elicit a statement from him. They assisted Mattox in his efforts to phone his attorney, his mother and brother, and to contact the victim's wife and another man, both thought to be connected with the murder. (Stipulation, Paragraphs 15, 32, in addition to paragraphs cited in the Statement of the Case.)

At no point did the police exert any effort or exhibit any intent either to prevent Mattox' attorney from seeing him or to isolate Mattox and corner him into a confession before he had an opportunity to exercise his constitutional rights. The reason that Mattox was not advised of his right to remain silent is that his interrogation took place prior to the *Escobedo* and *Miranda* decisions and it would not have been regular police procedure or a procedure then constitutionally required to advise an arrested suspect of his right to remain silent. Mattox was taken before a magistrate at 9:00 or 10:00 AM on October 2, 1963, the day after his arrest, and was then advised of his rights. (Paragraphs 26, 27.) It was stipulated that Commander Flanagan and Lieutenant Cartan of the Chicago police force would testify that in the late afternoon of October 1, 1963, when respondent was released into the custody of the Chicago police, there was no magistrate on duty to whom he could have been taken. (Paragraph 26.) Furthermore, the morning of October 2, when respondent was brought before a magistrate was in fact the earliest time after he was released into the custody of Chicago police that this could have been done. (Paragraph 27.)

From the standpoint of Mattox, too, this case is crucially different from *Escobedo*. Unlike Danny Escobedo, who was only 22 years old, was not a native speaker of English, and had had no previous experience with the police, Mattox was not in the position of intimidated suspect overwhelmed by the strange experience of police detention. Mattox was in his thirties at the time of the interrogation, an American who spoke English as his first language. He had been arrested and questioned by police before. (Tr. 894-897, cited in petitioner Finkbeiner's brief below in No. 75-1330.) He knew of his right to assistance of counsel and exercised it without interference to the extent that he chose. Although he was not then advised of his right to remain silent, Mattox had had previous experience with police interrogation. Furthermore, during the taking of his statement, he three times in effect exercised his right to remain silent by asking that certain questions and statements of his not be recorded by the stenographer. (Tr. 290, 291, 293, where the three instances are noted in the body of respondent's statement.)* Finally, this all occurred in what has been shown to be a context of voluntariness.

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* Even under Miranda, a suspect who after receiving the required warnings answers some questions but refuses to answer others and does not indicate that all questioning cease, has not asserted his right to remain silent in the sense that the police must stop all questioning, United States v. Carneglia, 468 F. 2d 1084 (2d Cir. 1972) cert. den. 420 U.S. 945; United States v. Brown, 459 F. 2d 319 (5th Cir. 1972); cert. den. 409 U.S. 864, reh. den. 409 U.S. 1119; United States v. Vasquez, 476 F. 2d 730 (5th Cir. 1973) cert. den. 414 U.S. 836.

5.

To Hold That Escobedo Applies To The Present Case Is To Be Guided Retroactively By Miranda.

The Seventh Circuit did not hold, of course, nor did Mattox argue below that full *Miranda* warnings should have been given to respondent before his interrogation. What the Seventh Circuit did do, however, was allow itself to be guided by the expanded awareness of constitutionally required procedure in police interrogations which has developed only as a result of nearly ten years' application of *Miranda*. This the Court did although Mattox' interrogation took place even before this Court's ruling in *Escobedo*. Instead of attempting to apply *Escobedo* through the perspective of *Miranda*, the Seventh Circuit should have viewed *Escobedo* in its proper place, that is to say, within the progression from the completely fact-sensitive test for voluntariness in the "totality of circumstances" to the almost per se ruling and guidelines of *Miranda*.

Prior to *Escobedo*, the determinative issue in the admissibility of a defendant's confession was whether in the "totality of circumstances" the confession could be considered "voluntary." *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Crooker* v. *California*, 357 U.S. 433 (1958); *Culombe* v. *Connecticut*, 367 U.S. 568 (1971); *Haynes* v. *Washington*, 373 U.S. 503 (1963). See also *Escobedo* itself, 378 U.S. at 491-92. There was no one requirement — except absence of physical brutality — without which a defendant's statement would be judged involuntary. Rather, it was the weight of all the attendant circumstances combined — the defendant's age, intelligence, education and psycho-

logical make-up; the conditions of his custodial detention; the actual knowledge of his rights** or his advisement of them by the police — by which the voluntariness and admissibility of his statement would be determined.

Escobedo was the first significant departure by this Court from the totality of circumstances approach. Even so it was not clear in that opinion itself just how great a departure was then intended. It was even less clear that this Court in *Miranda* would almost completely break with the old totality of circumstances test and substitute an exten-

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** It is true that this Court in *Miranda* dealt specifically with the question of what warnings are required in advising a defendant who knows his rights when it said, "We will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning . . . whatever the background the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise his privilege at that point in time," 384 U.S. 468-69. This was certainly not the law prior to *Miranda*, when of course there was no requirements of warnings at all. Rather, actual knowledge of one's rights — whether the result of recent warnings, prior experience, or education — was one circumstance to be considered in the totality. Crooker v. California, 357 U.S. 433 (1958); Commonwealth v. Schwartz, 233 A. 2d 904 (Pa Super. 1967).

It should again be mentioned in the present case that Mattox had been arrested and questioned by police before (Tr. at 894-97) and that he demonstrated enough self-possession during the taking of his statement to prevent certain of his comments from being recorded by the stenographer. He demonstrated such knowledge of his rights as to assert selective silence.

sive set of automatic and rather mechanical safeguards for both the Fifth and Sixth Amendment rights of a supect.

First of all, *Escobedo* focused narrowly on the Sixth Amendment right to counsel. The crux of the holding in *Escobedo* was denial of this right. Only later in *Miranda* did this Court concern itself with both the Fifth and Sixth Amendment rights of a suspect. What *Escobedo* did was to add to the voluntariness test already in existence, the requirement that a suspect not be denied his sixth amendment right to counsel. This is made clear both in Mr. Justice Goldberg's majority opinion and Mr. Justice Stewart's dissenting opinion. The Seventh Circuit erred by broadening *Escobedo* into the kind of safeguard promulgated only in *Miranda.*

Second, in another sense as well, *Escobedo* was not the great departure from the totality of circumstances test that *Miranda* was. The Court in *Escobedo* held that even if the traditional ind'cia of voluntariness were present in a defendant's interrogation, the defendant's confession would nevertheless be held inadmissible if his interrogators had actually interfered with his sixth amendment right to the assistance of counsel. If in examining the facts, a court reached the legal conclusion that a defendant had been "denied" the assistance of counsel, then that court must also conclude as a matter of law that any statement by the defendant was inadmissible at trial. "Denial" was a term of art attached to the legal conclusion that affirmative action by the police prevented a defendant who had requested an attorney from seeing one. This mixture of fact-assessment and legal conclusion behind the phrase "denial" of counsel led the Court in *Escobedo* both to speak approvingly of the "totality of circumstances" approach (applied specifically to the circumstances of absence of counsel) in

Crooker v. *California*, 357 U.S. 433 (1957), *Cicenia* v. *LaGay*, 357 U.S. 504 (1957), and to say: "In any event, to the extent that Cicenia or Crooker may be inconsistent with the principles announced today, they are not to be regarded as controlling," 357 U.S. at 491-91. Thus the Court did not make entirely clear the fate of the totality of circumstances test.

Only in *Miranda* was this test abandoned, or more precisely, left to one side. Alongside and separate from the traditional totality of circumstances to determine "voluntariness" was established a set of specific prophylactic rules to guarantee a defendant's constitutional rights. The *Miranda* warnings are definite, constant procedural guidelines which must be complied with. They are intended as a safeguard more certain in application at the time of interrogation and more certain in the retrospective judgment of the courts than the vaguer criterion of voluntariness alone. It is the definite and specific character of the *Miranda* warnings which is their challenge and their attraction. It is also what distinguishes *Miranda* from *Escobedo* and from this present case.

Miranda specifically requires that a defendant be advised of his right to consult with an attorney before and during interrogation and to have counsel provided if he is indigent. If an indigent defendant does request counsel, then counsel must actually be provided before interrogation begins. Under *Escobedo* neither the advisement nor the actual provision of an attorney is required. *Escobedo* requires merely that assistance of counsel not be denied if the suspect is not advised of his right to remain silent. Between the "denial" prohibited by *Escobedo* and the "provision" required by *Miranda* is the middle ground of Mattox' case in which the suspect "did not consult" an

attorney after his request and after the co-operation of his interrogators in trying to reach his attorney. To have demanded more effort on the part of Mattox' interrogators in helping him to secure the assistance of counsel would have meant demanding that they provide counsel in compliance with *Miranda*.

6.

It Is Particularly Unjust To Expand Escobedo To Cover This Case Since The Interrogation In Question Occurred Before Escobedo Was Decided.

The facts of this case must be put in proper perspective. The interrogation in question here took place on October 1 and 2, 1963. The *Escobedo* case was decided on June 22, 1964, nearly seven months later. The case of *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) which held that *Escobedo* was to apply to defendants whose trials occurred after the decision in *Escobedo* was handed down on June 20, 1966. When the Chicago police interrogated Richard Mattox on October 1 and 2, 1963, they had no inkling of the revolutionary change in the law of police interrogation and the admissibility of confessions that *Escobedo* and subsequent Supreme Court cases were to bring. The law at the time required that to be admissible a confession had to be voluntary, *Crooker* v. *California*, 357 U.S. 568 (1961); *Haynes* v. *Washington*, 373 U.S. 503 (1963). As the Stipulation of Facts indicates, the police interrogating Mattox did all they could to provide a relaxed and comfortable atmosphere in which any statement made would be voluntary. Moreover, the police were careful to follow the procedures for interrogation of suspects required by their department. (Stipulation, Paragraph 28.) There is no doubt that Mattox' interrogators were guided by and adhered to the judicial and

administrative principles in effect at the time of their actions. Petitioner Finkbeiner is not suggesting that *Johnson* v. *New Jersey, supra,* should be modified. Indeed it is his determined contention that there is no need to modify *Johnson* v. *New Jersey* since the facts of the present case do not demonstrate a denial of counsel as understood by *Escobedo.* Petitioner does suggest, however, that to render Mattox' statement inadmissible under *Escobedo* is not only an impermissible expansion of that ruling but also an expansion doubly unjust for being retroactively applied. If the slightest extension of *Escobedo* were to be allowed — despite this Court's mandate that it be narrowly construed — it certainly should not be in connection with an interrogation which occurred prior to the ruling.

A situation analogous to the present case was presented by *Michigan* v. *Tucker,* ——U.S.——, 94 S. St. 2357 (1974). Just as the interrogation in the present case took place before *Escobedo* and the trial took place afterward, the interrogation in *Tucker* took place before *Miranda* and the trial afterward. The factual situation in *Tucker* placed it at the outer boundaries of *Miranda.* It was questionable whether *Miranda* required exclusion of the disputed testimony. Under these circumstances this Court ruled narrowly that the testimony was admissible under *Escobedo* since the actual interrogation occurred before *Miranda* after *Escobedo.*

The Court noted that the *Miranda* rule "is calculated to prevent not to repair," to act as a deterrent of future abuse rather than a corrective for individual past errors, 94 S. Ct. at 2365. The deterrent purpose of the exclusionary rule

> assumed that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right . . . . where the official

> action was pursued in complete good faith, however, the deterrence rationale loses much of its force.
>
> 94 S. Ct. at 2365.

Because the police in *Michigan* v. *Tucker* "were guided, quite rightly, by the principles established in *Escobedo*," and adhered to that guidance, the Court believed that the witness's testimony was properly admitted despite what could have been at most a fringe violation of *Miranda's* exclusionary rule, 94 S. Ct. at 2365.

The parallel to Mattox' case is obvious. Here the applicability of *Escobedo* under *Johnson* v. *New Jersey* to a pre-*Escobedo* interrogation is at issue. At most respondent can argue that his case falls just within the outer boundaries of *Escobedo*. (Of course, however, petitioner contends that respondent's case fall squarely outside.) The police were guided by and thoroughly complied with pre-*Escobedo* standards in their interrogation of respondent. There was neither willful nor negligent violation of Mattox' constitutional rights by the police, nor is there any deterrent purpose that the retroactive expansion of *Escobedo* could serve. This Court should rule as it did concerning *Miranda* in *Tucker*, that since no deterrent purpose could be served by expanding *Escobedo* retroactively, it cannot require that Mattox' statements be excluded in the present case.

B.

Respondent's Statement Was Made Voluntarily

In its second opinion in the present case, the Court of Appeals made no comment on the voluntariness of respondent's statement. It did say that "the single issue on remand was the adequacy of the warning" of the right to remain silent "given in this case," p. 3 of the Order in No. 75-1330, June 16, 1975. The Court clearly believed at this point that

the failure to advise Mattox of his right to remain silent was completely determinative of the inadmissibility of his statement. But in its earlier opinion remanding the case to the District Court, 507 F. 2d 919, 923 (No. 74-1391, December 12, 1974), the Court had seen problems with both admissibility under *Escobedo* and the requirement of voluntariness when it said:

> Except in one particular, we agree with the district court that petitioner's statements to the Assistant State's Attorney could be deemed voluntary. As already noted, there is still a factual dispute as to whether the police advised petitioner that he could refuse to say anything if he so desired. The district court itself considered this to be the "most significant" aspect about the voluntariness issue. Therefore, at the evidentiary hearing, the court below must decide whether petitioner was deceived or tricked into giving the 1963 statements by being told merely that his rights would be protected if he did not sign anything. Of course, if the district court determines after the hearing on remand that petitioner had been informed of his right to remain silent, both the Escobedo and voluntariness issues can be resolved in favor of respondent.

The subsequent Stipulation settled the two factual questions mentioned by the Court of Appeals: Mattox was not warned of his right to remain silent (Paragraph 12); and the police did not tell Mattox that his rights would be protected if only he did not sign anything, nor did they deceive him in any other way (Paragraph 17, 18, 21, 22). It would seem then that the Court in its second opinion, although it held Mattox' statement inadmissible under *Escobedo* was satisfied that there was no other indication of involuntariness. Together, the failure to advise a defendant of the right to remain silent and trickery by the police

could indicate an involuntary statement as well as one taken in violation of *Escobedo*, but in the absence of the trickery complained of and all other forms of deception or coercion, only the claimed *Escobedo* violation could stand as a possibility. Therefore, now that it has been shown that Mattox' interrogation involved no denial of counsel, there can be no objection to the admission of Mattox' statement at his trial, either on *Escobedo* or on voluntariness grounds.

CONCLUSION

For the foregoing reasons, Petitioner Frederick Finkbeiner respectfully requests this Court to issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1391

UNITED STATES OF AMERICA ex rel.
RICHARD W. MATTOX,

Petitioner-Appellant,

vs.

HERBERT SCOTT, Warden, Illinois
State Penitentiary, Joliet Branch,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division —
No. 73 C 1396
RICHARD B. AUSTIN, *Judge*

ARGUED NOVEMBER 4, 1974 — DECIDED
DECEMBER 12, 1974

Before MARIS, *Senior Circuit Judge,** CUMMINGS and PELL, *Circuit Judges.*

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* Senior Circuit Judge Albert B. Maris of the Third Circuit is sitting by designation.

PER CURIAM. In a bench trial, this habeas corpus petitioner was convicted of the murder of Harvey Weinstein and received a 20-30 year sentence, which was affirmed on appeal. *People* v. *Mattox,* 96 Ill. App. 2d 148 (1st Dist. 1968). Leave to appeal to the Supreme Court of Illinois was denied on January 27, 1969. Petitioner's post-conviction petition under the Illinois Post-Conviction Hearing Act[1] was dismissed, and the order of dismissal was affirmed. *People* v. *Mattox,* 8 Ill. App. 3d 768 (1st Dist. 1972).

The present petition for writ of habeas corpus was filed on May 31, 1973. On June 4th, the district court granted respondent 20 days to answer or otherwise plead. After two additional extensions were granted, on August 16th petitioner filed a motion to set a hearing date. Nevertheless, two more extensions of time were granted before respondent filed a motion to dismiss or for summary judgment on September 18th.

On November 30, 1973, the district court rendered an opinion granting respondent's motion to dismiss for failure to state a claim, except as to whether petitioner's Sixth Amendment right to counsel during custodial police interrogation (made applicable to the states by the Fourteenth Amendment)[2] was violated under the rule of *Escobedo* v. *Illinois,* 378 U.S. 478, and whether any such violation was harmless[3]. 366 F. Supp. 1294, 1299.

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1. Ill. Rev. Stat. ch. 38, § 122-1 *et seq.* (1973).

2. See *Gideon* v. *Wainwright,* 372 U.S. 335, 342.

3. The standards of *Escobedo* v. *Illinois,* 378 U.S. 478, rather than the specific procedural requirements of *Miranda* v. *Arizona,* 384 U.S. 436, are applicable to this case because the trial began on August 16, 1965, which is before the decision in *Miranda* and after the decision in *Escobedo.* See *Johnson* v. *New Jersey,* 384 U.S. 719, 721.

On March 11, 1974, in another opinion, the district court granted respondent's motion for "summary judgment"[4] with respect to the remaining issues, holding that petitioner's right to counsel under *Escobedo* v. *Illinois* was not violated and that he gave his incriminating statement to the Assistant State's Attorney voluntarily, so that "the trial judge did not commit a constitutional error when he admitted the statement into evidence" at the murder trial. 372 F. Supp. 304, 311.

Necessity for Evidentiary Hearing

According to petitioner's February 1971 and October 1973 affidavits and verified petition for habeas corpus, during his interrogation about the Weinstein murder, he was told by police not to sign anything until he talked to a lawyer but was not advised of his right to remain silent. On October 2, 1963, during the course of his interrogation and after the police had permitted petitioner several unsuccessful attempts to contact his lawyer, petitioner made inculpatory statements to an Assistant State's Attorney which were transcribed and admitted at his trial as Exhibit 24. Petitioner followed the advice that he was allegedly given and refused to sign the transcription.

In August 1964, petitioner, against the advice of counsel, testified during a hearing on a motion for a new trial by Mrs. Weinstein, who had been convicted of her husband's murder prior to Mattox' conviction. During this hearing,

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4. Because we reverse the lower court's judgment and remand for a hearing on the merits of the petition, it is not necessary for us to consider the applicability of Fed. R. Civ. P. 56 on summary judgment to habeas corpus proceedings. Accordingly, we do not reach that issue. See 7 Moore's *Federal Practice*, 2d ed., ¶ 81.05[4] at 81.65-81.70.

petitioner reiterated that he had received advice from the police not to sign anything until he talked to his lawyer. However, on this occasion, he testified that Lieut. Cartan of the Chicago Police Department had also told him when he was under arrest at the Bedford Park Sheriff's Police Station not to say anything. The colloquy reads as follows:

"Q. After you were advised of your legal rights by Lt. Cartan at the Sheriff's Station, did you tell him what happened the night of September 30th?

A. He told me not to say anything, so I didn't say anything.

Q. He told you not to say anything and you said nothing, in the Sheriffs' Station, is that correct?

A. I said nothing from then on."

Petitioner's testimony at this hearing referred to his criminal record and became Exhibit 25 admitted at his trial.

Respondent filed no affidavits to support his position that during the October 1963 interrogation, petitioner had been advised of his right to remain silent. In deciding the *Escobedo* issue against petitioner, the district court relied solely on the petitioner's testimony at the hearing on Mrs. Weinstein's new-trial motion as proof that he had been so advised. Under the circumstances presented here, we hold that this isolated transcript excerpt is insufficient evidence upon which to justify the denial of an evidentiary hearing. The statement is fairly subject to a number of interpretations other than that it constituted full advisement to petitioner of the right to remain silent. Petitioner's verified petition and affidavits state he was not advised of that right. We think, therefore, that an evidentiary hearing should be held to determine if petitioner was properly advised of his *Escobedo* rights.

We may assume, for the purposes of this opinion and without deciding, that either petitioner's testimony at the

hearing on Mrs. Weinstein's motion for a new trial correctly recounted the advice that he received at the Sheriff's police station or that he is bound by said testimony in any event. Even so assuming, we are compelled to conclude that an evidentiary hearing is necessary to determine if petitioner was properly informed of his *Escobedo* rights. The evidence that petitioner was so informed is his own statement that a Chicago police officer "told me not to say anything." This is not conclusive evidence that petitioner was informed of his right to remain silent. Being "told" not to say anything at one point in a long period of interrogation is not synonomous with being advised of one's right to remain silent. There is little in the statement that "[h]e told me not to say anything" which would justify the conclusion that petitioner was fully informed of his *Escobedo* rights, that he understood those rights, and that his subsequent statements constituted a waiver thereof. Respondent did not choose to elaborate on what petitioner was told when respondent had the opporunity to do so by affidavit in the court below.

Without an evidentiary hearing, the district court could not properly evaluate the admission that it considered dispositive. Nothing in the crucial phrase could inform the court if petitioner was told not to say anything just while he was at the Sheriff's police station or if he was told that he had a continuing right to remain silent which he could exercise even after he had been transferred to Chicago Police Headquarters and an Assistant State's Attorney had begun to question him before a court reporter. The text of said questioning, which became Exhibit 24 at petitioner's trial, shows that petitioner was not informed of his *Escobedo* rights at this time. Petitioner's testimony at Mrs. Weinstein's hearing that he never made the statement

which become Exhibit 24 was not credited by the district court (372 F. Supp. at 308), so that one cannot infer therefrom that petitioner understood and exercised his right to remain silent.[5] Under the circumstances, we hold that the transcript quotation upon which the district court relied was insufficient evidence that petitioner had been informed of his *Escobedo* rights and that an evidentiary hearing into this question is required. *Townsend* v. *Sain*, 372 U.S. 293, 313.

In addition to the Sixth Amendment *Escobedo* point, petitioner's brief claims that he was entitled to an evidentiary hearing to determine whether he voluntarily made the October 1963 statements admitted as Exhibit 24 at his trial. Respondent argues that this issue is not properly before this Court because it was not raised in the district court.[6] We reject this argument. The petition for habeas corpus claims that the statements were obtained "by police deceit and fraud" in violation of the Fifth and Fourteenth Amendments, and the district court's second opinion in this

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5. Petitioner maintained at that hearing that the inculpatory statements were fabricated by the investigating officers and that he was told to state them.

6. The state also argued orally that the voluntariness issue was not properly before even the district court because petitioner had not exhausted his Illinois Post-Conviction Act remedies regarding this issue. In light of Ill. Rev. Stat. ch. 38, § 122-3 (1973), which provides that any claim not raised in the original or amended complaints under the Illinois Post-Conviction Act is waived, and this Court's recent opinion in *United States* ex rel. *Williams* v. *Brantley*, 503 F. 2d 1383 (7th Cir. 1974), we see no merit in the state's contention. See also *United States* v. *Bensinger*, — —F. 2d—— (7th Cir. 1974).

case specifically considered the merits of the voluntariness issue. 372 F. Supp. at 308-311. The court below apparently thought that this issue was only indirectly raised by the petition. 372 F. Supp. at 308. In light of the language alleging deceit and fraud in the procuring of the statement and invoking the Fifth and Fourteenth Amendments, we conclude that the petition directly raised the issue of voluntariness.

Except in one particular, we agree with the district court that petitioner's statements to the Assistant State's Attorney could be deemed voluntary. As already noted, there is still a factual dispute as to whether the police advised petitioner that he could refuse to say anything if he so desired. The district court itself considered this to be the "most significant" aspect about the voluntariness issue. *Therefore, at the evidentiary hearing, the court below must decide whether petitioner was deceived or tricked into giving the 1963 statements by being told merely that his rights would be protected if he did not sign anything.* Of course, if the district court determines after the hearing on remand that petitioner had been informed of his right to remain silent, both the *Escobedo* and voluntariness issues can be resolved in favor of respondent.

Failure to Comply with Time Limits of Habeas Corpus Act and Rule 81(a)(B), Fed. R. Civ. P.

The federal Habeas Corpus Act provides in pertinent part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person is not entitled thereto.

> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for a good cause additional time, not exceeding twenty days, is allowed. * * *" (28 U.S.C. § 2243).

Where, as here, the habeas corpus proceeding involves a person in custody pursuant to a judgment of a state court, Rule 81(a)(2) of the Federal Rules of Civil Procedure increases the additional time for the return of a writ or order to show cause from 20 to 40 days. Rule 81(a)(2) provides as follows:

> "The writ of habeas corpus or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days and in all other cases shall not exceed 20 days."

From the language of the statute and the Rule, it is clear that in the case of a petition under 28 U.S.C. § 2254, like this one, the person having custody must respond within three days unless for good cause the district court exercises its discretion to grant additional time not to exceed 40 days. This legislative schedule evidences the viewpoint of the Congress that dispatch is of utmost importance in habeas corpus proceedings. Congress was undoubtedly influenced by the possibility that the habeas corpus petitioner might be unlawfully imprisoned, and the time limits demonstrate its concern for an expeditious determination of that issue. The language is mandatory, "shall not exceed 40 days." The district court is given discretion to require a reply between 3 and 40 days after the writ is filed, but not thereafter.[7] The Advisory Com-

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7. In *Wallace* v. *Heinze*, 351 F. 2d 39 (9th Cir. 1965), certiorari denied, 384 U.S. 954, it was held that a district

mittee's notes to the 1971 amendment make it clear that the plight of the overworked state authorities was considered and the period of 40 days was nevertheless deemed the maximum that a petitioner could be made to wait without a response.[8]

Since the Attorney General's office did not file its motion to dismiss or for summary judgment until 106 days after the district court's order required it to answer or otherwise plead to the petition within 20 days, the requirements of Section 2243 and Rule 81(a(2) were not met. Petitioner somewhat halfheartedly contends that he is entitled to be released *instanter* because of this breach. The Advisory Committee's notes on Rule 81(a)(2), as amended in 1971, states that "the time allowed in such a case for the return of the writ may not exceed 40 days * * *." but no sanction is provided. We agree with the Sixth Circuit and Professor Moore's treatise that the Advisory Committee did not intend to provide for a habeas corpus petitioner's release in the event of a fail-

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judge had the "inherent power" to grant additional time beyond the statutory limit for a return in habeas proceedings. We note that the Court did not have the benefit of the 1971 amendment to Rule 81(a)(2) and the Advisory Committee's notes thereto. It seems possible that the Ninth Circuit would now reconsider its holding, but to the extent that its opinion conflicts with our decision here, we respectfully disagree.

8. The Notes of the Advisory Committee on Rules, speaking of the 1971 amendment, state:

"The substantial increase in the number of such proceedings [Section 2254 proceedings] in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases."

ure to make a timely return, for the burden of default would then fall upon the community at large. *Watmuff* v. *Perini,* 427 F. 2d 527, 528 (6th Cir. 1970); *Allen* v. *Perini,* 424 F. 2d 134, 138 (6th Cir. 1970). certiorari denied, 400 U.S. 906; 7 Moore's *Federal Practice,* 2d ed., ¶ 81.05[4] at 81.64-81.65. Federal Rules of Civil Procedure 12 and 55(a) do not require that the petition be granted by default because Rule 81(a)(2) provides for limited application of the other Rules and default judgments are generally inappropriate in habeas corpus cases. *Allen* v. *Perini, supra* at 138.

The district court should have proceeded as if it had received a return from the state authorities, that is, it should have proceeded as provided at the close of 28 U.S.C. § 243:

> "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

See *Allen* v. *Perini, supra* at 138, 143; *Witt* v. *Eyman,* 342 F. Supp. 392, 394 (D. Ariz. 1972). In some cases where the state authorities fail to file a timely return, it may not be necessary for the district court to conduct a full-scale hearing on the merits of the petition. For example, the court may find from a careful examination of the petition that there is a procedural defect, such as a failure to exhaust state remedies. *Allen* v. *Perini, supra* at 138-139. In this case, however, we have already decided that an evidentiary hearing is necessary. A habeas corpus petitioner may not be required to wait in jail beyond the 40-day limit because the state authorities are tardy with the return. At a point no later than 40 days after the receipt of the writ, the district court must proceed to consider the petition as if a return had been

properly made. The statute and Rule 81(a)(2), when read against the backdrop of the policy of dispatch in habeas corpus matters, dictate this procedure. It would also have been appropriate for the district court to censure the staff of the Illinois Attorney General and to refuse to consider the tardy return. See *Curtis* v. *Perini,* 301 F. Supp. 444, 445 (N.D. Ohio 1968), affirmed, 413 F. 2d 546 (6th Cir. 1969).

Grant of Respondent's Motion to Dismiss

As noted above, the district court granted respondent's motion to dismiss for failure to state a claim as to the other points raised in the petition for habeas corpus. The petitioner asserted that the state trial court could not admit in evidence certain articles obtained by an allegedly unconstitutional search of the home of the Weinsteins. The petitioner also asserted that he was incompetent when he waived his right to be free from compulsion to testify against himself and testified in support of Mrs. Weinstein's motion for a new trial, so that said testimony, containing his criminal record, should not have been considered at his murder trial. Petitioner also attacked the competency of his trial and appellate counsel. For the reasons given in the district court's first opinion (366 F. Supp. 1294), we agree that the dismissal as to these issues was proper.

The district court's dismissal order of November 30, 1973, is affirmed. Its judgment of March 11, 1974, is reversed, and the cause is remanded with instructions to grant petitioner an evidentiary hearing with respect to whether he had been advised of his right to remain silent

and had voluntarily made the oral statement of October 2, 1963, with costs on appeal to be borne by the respective parties.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

For the Seventh Circuit
Chicago Illinois 60604
Argued May 30, 1975
June 16, 1975
Before

RICHARD MATTOX,
Petitioner-Appellant,
vs.
No. 75-1330
FREDERICK FINKBEINER,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 1396
Richard B. Austin, Judge.

ORDER

Petitioner seeks enlargement on a writ of habeas corpus alleging that his conviction of murder at a bench trial was based on inculpatory statements obtained from him in

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*The Honorable William G. East of the District of Oregon at Eugene, Oregon, is sitting by designation.

violation of his right to the assistance of counsel as delineated in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Petitioner's trial commenced on August 16, 1965, after the decision of the Supreme Court in *Escobedo,* but prior to its decision in Miranda v. Arizona, 384 U.S. 436 (1965). The principles enunciated in *Escobedo* are therefore controlling here and *Miranda* has no application in this case. *Johnson* v. *New Jersey,* 384 U.S. 719, 733 (1966).

In his original application for a writ of habeas corpus, petitioner was met with a motion to dismiss his petition for failure to state a claim. 366 F. Supp. 1294 (N.D. Ill. 1973). Ruling against this motion, the district judge described the allegations in the petition and held that:

> Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the assistance of counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment; and no statement elicited by the police during the interrogation may be used against him at his criminal trial. 366 F. Supp. at 1298.

While respondents do not challenge this statement of the *Escobedo* rule, they contend that no denial of counsel took place since it is conceded that whenever petitioner requested permission to attempt to contact his attorney by telephone, he was allowed to do so. Petitioner contends that when he was unable to reach his attorney, continued

interrogation in the absence of a warning that he had a right to remain silent violated his right to counsel under *Escobedo*. It would appear that in his first order denying respondent's motion to dismiss, the district judge agreed with the petitioner's view of the law.

Some three and one-half months later, however, the district judge granted a summary judgment as to the issue of denial of the right to counsel and dismissed the petition. 372 F. Supp. 304 (N.D. Ill. 1974). He held that a review of the transcript of the state court proceedings leading to petitioner's conviction (which had been unavailable to the district judge at the time of the order sustaining the petition on respondent's motion to dismiss), showed conclusively that petitioner had been effectively warned of his right to remain silent during the interrogation process. Implicit in his decision on the *Escobedo* question was the view that continued questioning without such a warning would have amounted to a denial of counsel under *Escobedo*. 372 F. Supp. at 308.

Petitioner appealed to this court from the dismissal of his petition. We reversed, holding that a material issue of fact remained regarding whether or not an effective warning of the right to remain silent had been given. 507 F. 2d 919 (7th Cir. 1974). In doing so we framed the question in terms of whether or not "petitioner was properly advised of his *Escobedo* rights," *id.* at 921, thus deciding sub silentio that *Escobedo* required a warning of the right to remain silent in this case once petitioner had indicated his desire to consult his attorney and had unsuccessfully attempted to do so.

On remand, the parties entered into a stipulation of facts in lieu of an evidentiary hearing. In the stipulation it was agreed that petitioner had never been advised of

his right to remain silent in any way and that he repeatedly asserted his desire to consult with counsel during the hours of interrogation leading to his inculpatory statements. Petitioner then moved for discharge. His motion was denied by the district judge, who held that *Escobedo* was "inapposite" to the facts of this case. He also found petitioner's inculpatory statements to have been voluntarily made.

We reverse. Our previous opinion in this case made clear our determination that the principles in *Escobedo* were indeed apposite to this case and in addition that petitioner had a right under *Escobedo* to be warned of his right to remain silent before interrogation was continued in the face of a request to consult with counsel. The issue on remand was the adequacy of the warning in this case. The respondent has conceded that no warning whatever was given, and we have determined that introduction of petitioner's statements was not harmless. A fair reading of our previous opinion therefore requires that the petitioner's motion to discharge be granted.

The judgment of the district court is reversed and this case is remanded to that court with instruction that petitioner be released from custody after 120 days from the date of our judgment unless prior to that time he is brought to trial by the Illinois authorities.